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In the
Supreme Court of the United States

STEVEN J. HATFILL, M.D.,
Petitioner,

v.

THE NEW YORK TIMES COMPANY,
NICHOLAS KRISTOF,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court of appeals erred by declining to identify the "particular controversy giving rise to the defamation" of petitioner Steven Hatfill, as required by *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), and instead finding that Hatfill is a "limited purpose public figure" because he has some expertise relating to the broader issues discussed in the defamatory articles.

2. Whether the court of appeals erred by holding that Hatfill must show that the defamatory articles were *completely* fabricated to demonstrate "actual malice," even though the evidence revealed that some of the articles' allegations were fabricated and other statements made in the articles were embellished to support the allegation that Hatfill was the anthrax murderer.

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JURISDICTION

The judgment of the court of appeals was entered on July 14, 2008. The court denied en banc review on August 11, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

After letters containing anthrax killed five people in the fall of 2001, *New York Times* columnist Nicholas Kristof published a column declaring "I think I know who sent out the anthrax." Pet. App. 66a. From May through August of 2002 he followed up with five articles accusing petitioner Steven J. Hatfill, M.D., of the murders. Pet. App. 70a-89a.

When The Times began publishing Kristof's articles, Hatfill was virtually unknown. But Kristof made Hatfill infamous. By the time of the lower court decisions here, Hatfill was known far and wide as the prime suspect in the anthrax killings. He had been fired from his job, effectively barred from his profession, and subjected to years of public contempt and ridicule.

Today we know that it was all a terrible tragedy rooted in Kristof's vivid imagination. In August 2008, the Department of Justice officially exonerated Hatfill and explained that Dr. Bruce Ivins, who had

committed suicide, had been solely responsible for the anthrax attacks.

Notwithstanding Hatfill's virtual anonymity at the time of the attacks, the court of appeals held that he was a "limited purpose public figure" (required to show "actual malice") because, *years* before the attacks, Hatfill made some obscure press appearances questioning the country's preparedness for a bioterrorism attack. The court of appeals further held that Hatfill failed to present sufficient evidence of "actual malice" to reach a jury because he could not show that Kristof had "*completely* fabricated" his accusations. Pet. App. 25a (emphasis by the court, quotation omitted).

The decision below contradicts common sense, this Court's precedents, and the decisions of other courts of appeals and state courts of last resort. It is absurd to say that Steven Hatfill became a public figure subject to accusations of murder with impunity because he urged better preparedness for bioterrorism. And it is even more absurd to say that a public figure cannot prevail in a defamation case unless he can show that the false accusations were "*completely* fabricated." This Court's decisions in defamation cases strike a balance between the public interest in giving the press some breathing space, primarily to uncover abuses by public officials, and the rights of private citizens to protect their good names. *See, e.g.*, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974). The Fourth Circuit has abandoned that balance, unreasonably enlarged the public figure category, and made it virtually impossible for

a public figure to demonstrate actual malice in a defamation case.

Background. Hatfill was a medical researcher who, unlike Ivins, never worked with anthrax. Hatfill did work from 1997 to 1999 at the United States Army Medical Research Institute for Infectious Diseases ("USAMRIID") in Fort Detrick, Maryland, where he collected and tested blood samples of primates infected with viruses. JA1909-10.[1] USAMRIID's biocontainment facilities stored anthrax, but Hatfill neither knew where it was stored, nor had access to the secure facilities in which it was studied. JA1912-14.

In January 1999, Hatfill took a private-sector job with Science Applications International Corporation ("SAIC"). SAIC hired Hatfill because it needed additional instructors to lecture in hospitals regarding preparedness for terrorist events. As part of his job, Hatfill sometimes gave similar lectures to military audiences. JA2005-06.

In five years at USAMRIID and SAIC, Hatfill made three appearances on radio and television, all in 1998. He was on CBS Radio's Armstrong Williams Show discussing mass terror incidents as background for an author promoting a book on the Tokyo subway attack. JA663-66. He participated in a Radio America program on bioterrorism with another speaker. *Id.* And at his USAMRIID supervisor's request he appeared fleetingly in a

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[1] "JA" references are to the Joint Appendix filed in the Fourth Circuit.

biohazard suit (but did not speak) on a Canadian Broadcast television show. JA2026-27.

Hatfill was twice quoted in the print media during 1997 and 1998. In August 1997, Hatfill's acquaintance Fred Reed of the *Washington Times* quoted Hatfill in a column addressing the threat of bioterrorism because Reed did not want to "source myself." JA1885. In January 1998, *Insight Magazine* interviewed Hatfill for a similar article regarding the risks of bioterrorism. A photo of Hatfill pretending to prepare a toxin (plague) in his kitchen, taken some time earlier, appeared in the article. In March 1998, the French-language magazine *Quebec Science* noted that Hatfill had allegedly "demonstrated" making plague in his kitchen, presumably as a result of the *Insight* photo. *Quebec Science* neither interviewed nor quoted Hatfill.

In September 1999, in conjunction with his hospital lectures for SAIC, Hatfill co-authored an article in the trade journal "Surgical Services Management," which – like the classes Hatfill taught – urged hospital health officials to increase bioterrorism preparedness. Also in 1999, author Richard Preston interviewed Hatfill regarding the threat of bioterrorism, but did not publish anything from that interview until 2002, after the anthrax attacks.

In sum, Hatfill's public appearances before the anthrax attacks included two radio appearances, one non-speaking TV appearance, and quotations in two print media articles, all in 1997 and 1998. Hatfill did not appear in the general media from March 1998

until after the anthrax killings more than three years later. Hatfill's handful of obscure media appearances in the 1990s did not gain him any renown. Kristof's sources – including his primary source, Dr. Barbara Hatch Rosenberg – testified that they never heard of Hatfill until after the anthrax murders. *See* JA1762-63, JA1820-27, JA1866-67.

Rosenberg believed that Hatfill was behind the attacks, perhaps as part of a secret CIA project. JA1756-57. As a result of Rosenberg's theory, which she publicized on the Internet, reporters began to seek out Hatfill to question him. The Fourth Circuit noted that following the attacks Hatfill "told ABC News that it was difficult to make anthrax," but the court did not clarify who contacted whom or why. Pet. App. 16a. In fact, in January or February of 2002, Vic Walter and Brian Ross of ABC News sought out Hatfill in an unsuccessful attempt to get him to agree to an interview so they could confront him with Rosenberg's accusation. *Nothing* was ever published in any medium as a result of ABC News' pursuit of Hatfill.

Also in January or February of 2002, Scott Shane, then a reporter for the *Baltimore Sun*, twice telephoned Hatfill, because he was interested in Hatfill as a "potential subject of the investigation." JA1673-74. During Shane's second call to Hatfill, he accused Hatfill of committing the anthrax attacks. JA664-65.

In late May and early June of 2002, William Broad, a science reporter for The Times, sent Hatfill two letters requesting an interview. Hatfill phoned

Broad to ask that Broad stop contacting him. JA1993, SA18-19.

Hatfill's press contacts *after* the anthrax attacks but *before* Kristof's published accusations thus comprised: (1) being approached by ABC News and refusing to sit for an interview; (2) being accused by a Baltimore Sun reporter of the murders; and (3) declining to talk to The Times.

Kristof's Columns. After contacting Rosenberg about her insider theory, Kristof wrote five columns from May 24 to August 13, 2002 about the "likely culprit" in the anthrax attacks, whom the columns called "Mr. Z." Many readers recognized "Mr. Z" as Hatfill and Kristof acknowledged that "Mr. Z" was Hatfill in the final column. *See* Pet. App. 86a. Despite numerous warnings from experts and colleagues about Rosenberg's dubious expertise and credibility, *see* JA1749, JA1862-63, JA1920. Kristof focused exclusively on Hatfill as his "suspect."

Hatfill's suit alleged that Kristof's columns falsely accused him of committing the anthrax murders, based on a variety of false statements implying that Hatfill had the ability, access, and motive to make and send "dry" anthrax. ("Wet" anthrax is not as dangerous, and highly specialized expertise is required to convert it to its lethal "dry" form.) For example, Kristof falsely claimed that Hatfill had access to an "isolated residence" that was a CIA "safe house" and gave Cipro – an antibiotic used to treat anthrax – to people who visited it, thereby implying that Hatfill *had* used the location to make anthrax. Pet. App. 76a. Kristof also falsely wrote that Hatfill

had failed three polygraph examinations, suggesting that Hatfill had repeatedly lied to the FBI about the murders. *Id.* at 87a. In addition, Kristof falsely stated that Hatfill had traveled under an "alias," *id.* at 76a, suggesting that Hatfill had something to hide. Kristof also claimed that "specially trained" bloodhounds had "responded strongly" to Hatfill eleven months after the murders, *id.* at 87a, notwithstanding that another journalist had already debunked the story. And so on: Kristof alleged that Hatfill was one of a "handful" of people who had the ability to make and send dry anthrax, *id.* at 72a; that he "unquestionably had the ability to make first-rate anthrax," *id.* at 72a; and that his anthrax vaccinations were up to date, *id.* at 72a – all false.

Kristof's effort to "light a fire under the F.B.I." to investigate Hatfill, *id.* at 73a, succeeded. The FBI searched Hatfill's apartment on June 25, 2002, and, as a result of an unlawful leak by law enforcement officials, the search was televised.[2] Although nothing incriminating was found, Kristof continued to write columns urging the FBI to further investigate Hatfill. The FBI conducted another televised search on August 1, again finding nothing, but Attorney General Ashcroft identified Hatfill as a "person of interest" in the anthrax investigation on August 6, 2002, on both NBC's "The Today Show" and CBS's "The Early Show." Kristof then wrote his final column in the series, congratulating the FBI for finally making progress. *Id.* at 88a-89a.

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[2] Hatfill recently settled his separate Privacy Act suit against the federal government.

The Decisions Below. Hatfill sued The Times for defamation and intentional infliction of emotional distress in the Eastern District of Virginia, based on diversity jurisdiction. The district court dismissed the complaint, holding that no reasonable person could find Kristof's columns defamatory. The Fourth Circuit reversed, finding that "a reasonable reader of Kristof's columns likely would conclude that Hatfill was responsible for the anthrax mailings." *Hatfill v. New York Times Co.*, 416 F.3d 320, 333 (4th Cir. 2005).

During discovery after remand, Kristof refused to identity two anonymous FBI sources who had purportedly told him that Hatfill had failed three polygraph examinations. Magistrate Judge O'Grady ruled that Hatfill had a "'compelling interest'" in obtaining the identifications of the alleged sources. Pet. App. 62a. The court reasoned that if (as Hatfill expected) the individuals denied being the sources that would further suggest that Kristof was reckless in making the accusation.

District Judge Hilton granted The Times' motion for summary judgment without explaining how that dismissal could be consistent with Judge O'Grady's conclusion that Hatfill had a compelling need for evidence being withheld by The Times. The court held that Hatfill was a "limited purpose public figure" required to prove actual malice, and that he had not offered sufficient evidence to reach a jury. Pet. App. 43a.

The Fourth Circuit affirmed. The court rejected Hatfill's argument that his limited participation in a

general debate regarding the nation's preparedness for biological attack from 1996 to 1998 did not make him a public figure for purposes of the "particular" public controversy regarding the 2001 anthrax attacks. *Gertz*, 418 U.S. at 345. The court further held that the actual malice standard "demands evidence of the 'publication of a *completely* fabricated story.'" Pet. App. 25a (quoting *Ryan v. Brooks*, 634 F.2d 726, 732 (4th Cir. 1980)). Because Kristof cited some facts that were *not* fabricated, the court indicated, it did not matter that Kristof had fabricated *some* allegations and stretched the truth with respect to others. Finally, the Fourth Circuit appeared to misunderstand Hatfill's argument that summary judgment on the malice issue was particularly inappropriate because Kristof had refused to identify his alleged FBI sources. Although Hatfill had argued that denials by those alleged sources would help to support a finding of actual malice, the court of appeals treated Hatfill's argument as a challenge to the adequacy of the evidentiary sanction imposed by the district court. *Id.* at 27a.

REASONS FOR GRANTING THE PETITION

This Court should review the Fourth Circuit's decision because it is inconsistent with the precedents of this Court, other courts of appeals, and state courts of last resort. Moreover, if Hatfill is a "limited purpose public figure" with respect to the controversy concerning who committed the anthrax murders – a controversy that Hatfill avoided – on account of a handful of appearances years earlier

advocating better preparedness for bioterrorist attacks, then that category has been broadened beyond any reasonable limit. Similarly, if a public figure must show that the accusations against him were "*completely* fabricated," there is no meaningful limit to the false attacks that may be made on limited purpose public figures.

I. THE COURT SHOULD REVIEW THE FOURTH CIRCUIT'S REFUSAL TO IDENTIFY THE "PARTICULAR PUBLIC CONTROVERSY" GIVING RISE TO THE DEFAMATION.

A. The Fourth Circuit's Decision Is Inconsistent With *Gertz*.

Gertz is this Court's seminal case on "limited purpose public figures." It establishes a balance between protecting the media against defamation suits that might lead to self-censorship and the competing value of "the individual's right to the protection of his own good name." *Id.* at 341.

The *Gertz* Court found that public figures, like public officials, may "occupy positions of such persuasive power and influence" that they "run[] the risk" of "public scrutiny" for "all purposes." *Id.* at 344-45. "More commonly," however, "those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." *Id.* at 345. Such individuals "invite attention and comment" with respect to the "particular" public controversies they seek to influence. *Id.*

Gertz thus requires courts to distinguish the *particular* public controversy as to which an individual has invited attention and accepted the risk of scrutiny from the individual's involvement in public life generally. The Court's analysis in *Gertz* did exactly that. The Court first found that petitioner was not a "public figure for all purposes" because he had "achieved no general fame," even though he had "served as an officer of local civic groups and of various professional organizations, and he ha[d] published several books and articles on legal subjects." *Id.* at 351. Indeed, other authorities have noted that Gertz had "authored four books and 'thousands' of articles in legal, historical, and literary publications, had been the subject of forty articles in Chicago papers, and had made many television and radio appearances." *See, e.g., Bruno &. Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 588 n.14 (1st Cir. 1980) (citing *Schultz v. Reader's Digest Ass'n*, 468 F. Supp. 551, 558 (E.D. Mich. 1979)).

Instead of looking broadly at Gertz's public appearances, this Court found it should "reduce the public-figure question to a more meaningful context by looking to the nature and extent of [Gertz's] . . . participation *in the particular controversy giving rise to the defamation*." *Id.* (emphasis added). The "particular controversy giving rise to the defamation" in *Gertz* concerned the murder of a Chicago youth by a city policeman. The Court carefully limited its inquiry concerning petitioner's public life to that controversy. The Court did *not* consider the relationship between the particular controversy at issue and Gertz's participation (if any) in broader

societal debates. Accordingly, this Court's opinion in *Gertz* does not reveal whether Gertz's many books, articles, and appearances addressed broader societal debates such as police brutality, the then-rapidly growing problem of homicide in Chicago, the possible threats that communism or communist activists may have been thought to pose to society at the time, or any other subject beyond the "particular controversy giving rise to the defamation." Under *Gertz*, the issue is the extent of an individual's participation in the *particular controversy giving rise to the defamation.*

Before the court below, Hatfill argued that, under *Gertz*, any general public debate concerning the nation's preparedness for biological attack – a "debate" in which Hatfill attained no special prominence in any event – was *not* the "particular" public controversy giving rise to the defamation. Rather, the controversy was about who committed the 2001 anthrax murders and whether law enforcement authorities were doing enough to apprehend the criminals. *That* controversy – in which Hatfill had *no* voluntary involvement – was the particular controversy giving rise to the defamation.

Hatfill further argued that the policies underlying *Gertz* make it critical to draw this distinction between the broad debate in which Hatfill had voluntarily played a minor role and the particular controversy about which Kristof wrote. The *Gertz* Court focused on the extent to which an individual should be considered to have voluntarily "run[] the risk" of close public scrutiny, or to have "invite[d]

attention and comment." 418 U.S. at 344-45. By choosing to represent the family of the victim in *Gertz*, the plaintiff there could not reasonably be considered to have accepted the risk of being accused of being a criminal or a Communist. Similarly, by educating first responders about the need to prepare for biological attack, Hatfill could not reasonably be considered to have accepted the risk of being accused of murdering people with anthrax.

Ignoring the distinction made by *Gertz* has dire implications for public discourse. For example, there is undoubtedly a public controversy today regarding gun control, with some experts urging that the government has not done enough to curb gun ownership and others arguing that it has done too much. But if Hatfill were an expert taking part in that debate – publicly lobbying, for example, against extending handgun bans to rifles – he ought not with impunity be falsely accused of shooting shoppers in parking lots with a rifle. Similarly, if Hatfill were an expert on nuclear weapons – arguing, for example, that battlefield nuclear weapons should be part of the United States' arsenal – he ought not with impunity be falsely accused of exploding a dirty bomb in the Metro. If he were an expert on teenage sexual behavior – arguing, say, for more sexual education in our schools – he ought not with impunity be falsely accused of molesting a neighbor's child. Such terrible crimes would undoubtedly generate particular public controversies – but those would be very *different* controversies from the broad debates in which experts voluntarily engage. A contrary result would

open any expert on a controversial subject to false accusations of heinous crime.

That is among the dangers posed by the decision below, which effectively reads the word "particular" out of *Gertz*. Rather than focus on any "particular" controversy, the Fourth Circuit found that it should examine the scope of the issues addressed by The Times' articles and then consider whether Hatfill had ever spoken publicly on an issue raised in the articles: "[T]he 'use of the word "particular" signifies only that a court must identify the specific or "particular" controversy or controversies fairly addressed *by the publication* at issue before determining whether the plaintiff had voluntarily participated in the controversy so identified.'" Pet. App. 19a (quoting without citation from The Times' brief at 44) (emphasis added). This approach turns *Gertz* on its head. Instead of identifying the "particular controversy giving rise to the defamation" and examining whether the plaintiff has thrust himself into *that* controversy, the Fourth Circuit looked broadly at *every* issue raised by the articles in which the defamation happened to appear, and examined whether the plaintiff voluntarily participated in debate on any such issue.

The lower court's approach is irreconcilable with *Gertz*. Again, the *Gertz* Court did not catalog the topics covered by the defamatory article there – which surely included, for example, discussion of the perceived threat from communism generally – and then examine Gertz's voluminous writings and frequent appearances to determine whether he had

ever addressed any of those topics. From the *Gertz* Court's analysis, we have no idea whether Gertz ever spoke or wrote on communism because, under this Court's analysis, that was beside the point. The point was that the defamation arose from a *particular* public controversy surrounding a murder with which Gertz had no connection. The same is true here.

The error in the court's analysis below is *not* the misapplication of law to fact. Rather, the legal rule articulated by the lower court fundamentally distorts the analysis required by *Gertz*. Moreover, it does so because the lower court failed to credit the balance struck by *Gertz* and the policies underlying that balance. The lower court wrote that *the* "purpose of the public figure doctrine [is] to encourage robust and uninhibited commentary on public issues." Pet. App. 20a. But that is only *one* of the purposes of the doctrine. As the *Gertz* Court wrote, "[t]he need to avoid self-censorship by the news media is . . . not the only societal value at issue. If it were, this Court would have embraced long ago the view that publishers and broadcasters enjoy an unconditional and indefeasible immunity from liability for defamation." *Gertz*, 418 U.S. at 341. This Court has not done so. Rather, it has "sought a more appropriate accommodation between the public's interest in an uninhibited press and its equally compelling need for judicial redress of libelous utterances." *Time v. Firestone*, 424 U.S. at 456. The lower court flatly ignored this Court's balance.

B. The Fourth Circuit's Decision Is Inconsistent With Other Decisions Of This Court.

The Fourth Circuit's reliance on Hatfill's contacts with the press *after* the anthrax attacks conflicts with decisions of this Court other than *Gertz*. As explained above, Hatfill *resisted* the efforts by the *Washington Times*, *Baltimore Sun*, and *New York Times* to interview him because he perceived that they wanted to accuse him of being the murderer.

Efforts by reporters to bait someone they suspect of a crime into an interview so as to confront him with an accusation plainly do not represent the suspect "thrusting" himself "to the forefront of [a] particular public controvers[y] in order to influence the resolution of the issues involved." *Gertz*, 418 U.S. at 345. In *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157 (1979), Wolston had pleaded guilty to criminal contempt for failing to testify in connection with the government's investigation of Soviet espionage. A book later accused him of being a Soviet spy. This Court rejected the argument that Wolston's contempt conviction made him a public figure: "It would be more accurate to say that [Wolston] was dragged unwillingly into the controversy. The Government *pursued him* in its investigation." *Id.* at 166 (emphasis added). The same is true of Hatfill – reporters *pursued him* in their reporting of the anthrax murders, but under this Court's precedents, that does not make him a public figure.

More recent cases confirm this rule. For example, in *Hutchinson v. Proxmire*, 443 U.S. 111 (1979), the

plaintiff was a behavioral scientist who received federal funds for conducting research on primates. Respondent was a senator who "awarded" plaintiff a "Golden Fleece Award" for wasting the public's money. This Court observed:

> Hutchinson's activities and public profile are much like those of countless members of his profession. His published writings reach a relatively small category of professionals concerned with research in human behavior. To the extent the subject of his published writings became a matter of controversy, it was a consequence of the Golden Fleece Award.

Id. at 135. The Court concluded that "those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure." *Id.* Hatfill's "activities and public profile [were] much like those of countless" other researchers and lecturers on the subject of bioterrorism. Indeed, there were surely dozens (if not hundreds) of professionals in the field better known than Hatfill, who had *one* minor publication in a specialized trade magazine. To the extent that Hatfill gained notoriety, it is *because* of unjustified attacks by Kristof and others in the media.

The court below also relied on contacts between Hatfill and the press that occurred *after* Kristof's published accusations against him. The lower court ignored this chronology, presumably because it thought the point irrelevant. But under this Court's precedents, the point is directly relevant. Being

accused of murder attracts a good deal of press attention, and accused individuals are often highly motivated to deny the accusations. But such contacts do not for a moment suggest that Hatfill "voluntarily" thrust himself into the controversy surrounding the anthrax investigation. *See Time v. Firestone*, 424 U.S. at 455 n.3 ("[T]he fact that respondent may have held a few press conferences . . . to satisfy inquiring reporters" did not "convert[] her into a 'public figure.'").

C. The Fourth Circuit's Decision Conflicts With Decisions Of Other Circuits And State Courts Of Last Resort.

The standards applied by courts of appeals and state courts of last resort to determine who is a "limited purpose public figure" vary dramatically. Because the facts of every defamation case are different, the conflict among the courts is perhaps less obvious than it would be on a simple matter of statutory interpretation, but it is just as real. This Court should grant certiorari to ensure that the lower courts uniformly apply the analysis required by *Gertz*.

Some courts have no trouble following this Court's guidance. The D.C. Circuit's decision in *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287 (D.C. Cir. 1980), cogently summarized what this Court's precedents require. The court began by quoting *Gertz*'s holding that it must examine "'the nature and extent of an individual's participation in the particular controversy giving rise to the defamation.'" *Id.* at 1292 (quoting *Gertz*, 418 U.S. at

352). The "first step" in that inquiry is to "isolate the public controversy." *Id.* at 1296. The court further explained that, under *Gertz* and *Wolston*, a plaintiff may well be a limited purpose public figure in connection with one public controversy, but *not* in connection with a related controversy or "subcontroversy." *Id.* at 1296-97. The second step in the analysis – after the "the court has defined the controversy" – requires analyzing whether plaintiffs have "'thrust themselves to the forefront'" of that controversy. *Id.* (quoting *Gertz*, 418 U.S. at 345). "Finally," the *Waldbaum* court found, "the alleged defamation must have been germane to the plaintiff's participation in the controversy." *Id.* at 1298.

The *Waldbaum* court's analysis has been adopted by other circuits. The Eleventh Circuit, for example, has found that "[t]he proper standards for determining whether plaintiffs are limited public figures are best set forth in *Waldbaum*." *Silvester v. American Broadcasting Companies, Inc.*, 839 F.2d 1491, 1494 (11th Cir. 1988). The *Silvester* court summarized those standards as follows: "Under the *Waldbaum* analysis, the court must (1) isolate the public controversy, (2) examine the plaintiffs' involvement in the controversy, and (3) determine whether 'the alleged defamation [was] germane to the plaintiffs' participation in the controversy.'" *Id.* The Seventh and Ninth Circuits have also recognized the *Waldbaum* analysis – *see, e.g.*, *O'Donnell v. CBS, Inc.*, 782 F.2d 1414, 1417 (7th Cir. 1986) ("Both parties agree that application of the three-part test for determining limited purpose public figures

enunciated in *Waldbaum* . . . is proper."); *Shoen v. Shoen*, 48 F.3d 412, 417 (9th Cir. 1995) ("The district court found that plaintiffs are limited purpose public figures under the test established in *Waldbaum*."). Moreover, state courts of last resort continue to adopt the *Waldbaum* approach. *See, e.g., Cottrell v. National Collegiate Athletic Association*, 975 So.2d 306, 334 (Ala. 2007) ("[T]his Court adopts [the three-pronged *Waldbaum* test] and will now apply it to the facts of this case."); *Lassonde v. Stanton*, 2008 N.H. LEXIS 99, *13-14 (N.H.) ("'As the first step in [the limited-purpose public figure] inquiry, the court must isolate the public controversy.'") (quoting *Waldbaum*, 627 F.2d at 1296).

The Eighth Circuit's application of the *Waldbaum* standards in *In re: IBP Confidential Business Documents Litigation*, 797 F.2d 632, 645-47 (8th Cir. 1986), illustrates how those standards should apply here. Defendant IBP argued that the plaintiff, Bagley, was a limited purpose public figure because in 1977 and 1978 he repeatedly met "freely and voluntarily" with attorneys involved in "extensive antitrust litigation against IBP" to share internal IBP documents about the company's competitive practices. *Id.* at 636, 646. In 1979, those practices became the subject of House subcommittee hearings in which IBP submitted a letter containing false accusations against Bagley. *Id.* at 638-39. The Eighth Circuit held that the "particular public controversy" giving rise to IBP's defamatory speech was the subcommittee's 1979 investigation of IBP – the earlier "activities relied on by IBP were distinct from and unrelated to Bagley's involvement in the

particular public controversy 'giving rise' to the [defamatory] letter." *Id.* at 646.

Under the *Waldbaum* standard, there is no question that Hatfill is not a limited purpose public figure. The alleged defamation was Kristof's accusation that Hatfill committed the anthrax killings. It follows that the particular public controversy "giving rise" to the defamation was the anthrax investigation. In the words of the *Waldbaum* court, "[a] general concern or interest" in the nation's preparedness for bioterrorism of the sort Hatfill expressed in the late 1990s "will not suffice" to constitute a "public controversy" under *Gertz*. 627 F.3d at 1297. Moreover, in the words of the *IBP* court, Hatfill's occasional commentary during that time on issues of bioterrorism was "distinct from and unrelated to [his] involvement [or, in Hatfill's case, his lack of involvement] in the particular public controversy 'giving rise' to the" defamation. 797 F.2d at 646. The decision of the Fourth Circuit below fails to "isolate" the public controversy giving rise to the defamation, in contrast to the *Waldbaum* approach.

Unfortunately, the Fourth Circuit is not alone in ignoring this important element of the limited purpose public figure analysis. Contrary to *Gertz*, a number of circuits apply standards that do not call for isolating the particular controversy giving rise to the defamation, or require anything more than a "general concern or interest" to qualify as a public controversy. In *Lerman v. Flynt Distributing Co., Inc.*, 745 F.2d 123, 136-37 (2d Cir. 1984), the Second

Circuit held that a plaintiff is a "limited purpose public figure" if he has:

> (1) successfully invited public attention to his views in an effort to influence other[s] prior to the incident that is the subject of litigation;
>
> (2) voluntarily injected himself into a public controversy related to the subject of the litigation;
>
> (3) assumed a position of prominence in the public controversy; and
>
> (4) maintained regular and continuing access to the media.

Like the Fourth Circuit, the Second Circuit makes no effort to ensure that the plaintiff voluntarily injected himself into the *particular* controversy that gave rise to the defamation – it is sufficient that the plaintiff "invited public attention to his views" on *any* public controversy *related* to the subject of the litigation.

Lerman illustrates how dramatically this difference in legal standards affects analysis of "limited purpose public figure" issues. The plaintiff in *Lerman* – better known as Jackie Collins – sued because a magazine claimed that she had appeared in an orgy scene in an adult film, complete with pictures falsely identifying her. The Second Circuit found that Lerman was not a public figure for all purposes. *Id.* at 137. But because Lerman's books were "racy" and "sexy," and because she appeared in the media criticizing "inequality in the treatment accorded females vis-à-vis males," the court found that Lerman was a public figure for purposes of a

"public controversy" regarding the "relations between the sexes and public nudity." *Id.* The Second Circuit rejected the district court's holding that "such a topic is merely a matter of interest, but not a true public controversy." *Id.* The appellate court did not even attempt to explain how Lerman, by writing sexy books and advocating gender equality, participated in a "particular" controversy that "gave rise" to an accusation that she appeared in an orgy scene. *Gertz*, 418 U.S. at 344-45. The Second Circuit thus applies a standard much like that applied by the Fourth Circuit in this case.

The Third Circuit similarly ignores *Gertz*'s requirement that the plaintiff participate in a "particular" public controversy giving rise to the defamation. In *Marcone v. Penthouse Int'l Magazine for Men*, 754 F.2d 1072, 1077 (3rd Cir. 1985) (emphasis omitted), Marcone claimed that Penthouse's report that Marcone had engaged in a marijuana transaction and that the charges against him were dropped only because Marcone "cooperated with further investigations" was false and defamatory. The Third Circuit found that whether Marcone was a limited purpose public figure depended on "(1) whether drug trafficking is a 'public controversy' and (2) the 'nature and extent' of Marcone's participation in this controversy." *Id.* at 1082. The court devoted only a paragraph to concluding that "[d]rug trafficking" is "one of the most troubling issues of our time" and "surely falls within the ambit of public controversy." *Id.* at 1083. Like the Fourth Circuit in this case and the Second Circuit in *Lerman*, the *Marcone* court did not even

attempt to identify a *particular* public controversy as required by *Gertz*.[3]

Under the standards applied by the Second, Third, and Fourth Circuits – in contrast to the D.C., Seventh, Eighth, Ninth, and Eleventh Circuits – an individual is a limited purpose public figure if he has "invited public attention to his views" on *any* public controversy *related* to the subject of the litigation. Under this approach, *any* expert on a subject involving public controversy may with impunity be accused of *any* related crime – just as the Fourth Circuit held that Hatfill could be accused of murder because of his expert appearances addressing bioterrorism.

In *Gertz*, this Court attempted to strike a *balance* between two competing concerns. Today, there is confusion about that balance in the lower courts, with one "limited purpose public figure" test that respects this Court's balance and an equally influential one that does not. This Court should grant certiorari to resolve the conflict by correcting those courts that have disregarded the command in *Gertz* to identify a *particular* public controversy giving rise to the defamation so as to limit the situations in which reputations may be destroyed with impunity.

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[3] Just as the *Waldbaum* approach continues to influence state courts of last resort, *see supra* at 18-21, other such courts continue to look to the contrasting approach of *Lerman* and *Marcone*. *See, e.g., State v. Carpenter*, 171 P.3d 41 (Alaska 2007) (urging adoption of the *Lerman* test) (Carpeneti, J., concurring).

II. THE COURT SHOULD REVIEW THE HOLDING THAT "ACTUAL MALICE" REQUIRES A SHOWING THAT DEFAMATORY ARTICLES WERE "*COMPLETELY* FABRICATED."

To show actual malice, a plaintiff must show that the defendant published a false statement with "knowledge of falsity or reckless disregard as to truth or falsity." *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 511 (1991). Hatfill presented considerable evidence supporting his claim that Kristof wrote the articles accusing Hatfill of being the anthrax murderer even though he either knew that the charge was false or, at the least, that he made his false allegations recklessly. The Fourth Circuit *did not review* the vast bulk of that evidence. Instead, it satisfied itself that there was *some* truth to the evidence Kristof presented suggesting that Hatfill *might* be the anthrax murderer, and held that because the charge was not "*completely* fabricated," Pet. App. 25a (emphasis by the court), Hatfill had necessarily failed to establish actual malice.

This approach contravenes the precedents of this Court and other courts of appeals, and also makes no sense. Where (as here) the evidence demonstrates that a reporter fabricated *some* elements of a false accusation, a reasonable jury could conclude that the author doubted the truth of his allegation or there would have been no need to fabricate evidence.

A. The Fourth Circuit Ignored Evidence Of Actual Malice Because The False Allegations Were Not "*Completely* Fabricated."

A brief review of the evidence shows that the Fourth Circuit's "*completely* fabricated" rule caused it to ignore substantial evidence showing that Kristof either doubted the truth of his assertion that Hatfill was the anthrax murderer or recklessly made claims supporting that assertion.

The claim that Hatfill dispensed Cipro at a "safe house." One of Kristof's most damaging allegations was that Hatfill had access to an "isolated residence" and "gave Cipro to people who visited it." Pet. App. 76a. Kristof also suggested that the "isolated residence" might be a "safe house[] operated by American intelligence." *Id.* This accusation is extremely harmful because it identified a specific location where Hatfill might have made the anthrax that was used to kill people. The allegation concerning Cipro – an antibiotic used to treat people exposed to anthrax – was particularly damning, because it strongly suggested that Hatfill in fact *had* used the "isolated residence" to make or send the anthrax and needed to ensure that visitors were not harmed by exposure to anthrax. A reader of the column commented: "it is amazing what you found out – the building, the Cipro. . . . it really is incredible. it's almost too perfect." Ex. 54.[4]

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[4] Citation is to an exhibit submitted to the district court.

But this claim is entirely untrue. The "isolated residence" was, in fact, a house owned by attorney George Borsari, who testified that "there's no way in the world Steve Hatfill could have made anthrax at my house." JA1926. In addition, Borsari's house was not a CIA "safe house." There is simply no basis at all for that bizarre allegation. Kristof first said that he thought he "had heard that idea from somebody and thought it was from Barbara [Rosenberg]." JA1799. Rosenberg, however, first heard this allegation from *Kristof*. JA1772-76, JA1778, *see also* JA1934. Confronted with Rosenberg's emails to this effect, Kristof described his allegation as "partly guesswork" based on a "tantalizing possibility." JA1798-99. That amounts to clear and convincing evidence that Kristof simply fabricated the allegation.

The allegation that Hatfill failed three polygraph examinations. Kristof wrote that Hatfill had "failed three successive polygraph examinations since January." Pet. App. 87a. That is a damaging allegation because it implies that Hatfill repeatedly lied to the FBI about his involvement with the anthrax murders. The allegation is false. Hatfill took one FBI polygraph examination and was told by the examiner that he passed. *See* JA1945.

Kristof claims that two FBI agents – known as "confidential sources #2 and #3" – provided this information. JA1811-12. The magistrate concluded that Hatfill needed to depose these sources to "determine if Mr. Kristof accurately reported information the sources provided," in part because

the magistrate concluded that Rosenberg's "testimony contradicts Mr. Kristof's testimony regarding what Dr. Rosenberg told him." JA 99, 107. Because Kristof's "state of mind . . . is central to this dispute," the magistrate held that Hatfill had a "compelling interest in the information." JA 99, 100.[5]

After Kristof failed to identify his sources, the magistrate ordered that The Times "not be allowed to refer to, rely on, or enter into evidence t[he] existence of Confidential Source #2 or #3." JA 107. As a result, the magistrate stated, The Times "is left with little to no explanation for some of the allegedly defamatory statements which Defendant published." *Id.* Under the magistrate's order, The Times has *no* source for the allegation that Hatfill failed three polygraph examinations. In that circumstance, a reasonable jury could conclude that, as with the "safe house" allegation, Kristof simply fabricated the allegation as "tantalizing guess work."

The Hatfield "alias." In the July 2 column, Kristof said that he had "found at least one alias" allegedly used by Hatfill. This is a damaging

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[5] Kristof identified Rosenberg, Meryl Nass, and Milton Leitenberg as sources for the claim that Hatfill unquestionably had the ability to make first-rate anthrax, JA1789-90 (referring to a confidential source later identified as Nass), but each denied being his source. JA1764-65; JA1853-55; JA1866. Kristof also claimed that Rosenberg and Nass told him that Hatfill had up-to-date vaccinations, but each denied that she had been the source for that information. JA1809-10 (referring a to confidential source later identified as Nass); JA1766-67; JA1865-67.

allegation because honest citizens, unlike anthrax murderers, do not need aliases. But the "alias" was a common misspelling of Hatfill's name, "Steven Hatfield." JA1937. Kristof, who on this logic sometimes uses the alias "Kristoff," did not identify the supposed alias in his columns, thereby willfully misleading his readers while concealing the obvious weakness of the allegation.

The miracle bloodhounds. Kristof wrote that "[s]pecially trained bloodhounds were given scent packets preserved from the anthrax letters," and "responded strongly" to Hatfill. Pet. App. 87a. Common sense refutes the idea that a bloodhound – specially trained or otherwise – could identify a person from the scent of a letter mailed 11 months previously and on which the mailer had left no DNA. Scott Shane of the *Baltimore Sun* had reached that conclusion and debunked the "bloodhound evidence" in a report published five days before Kristof included it in his column. *See* JA1950-52. Kristof did not investigate, but instead chose to publish a story "so inherently improbable that only a reckless man would have put [it] in circulation." *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968).

The Fourth Circuit's basis for ignoring the evidence showing actual malice. The Fourth Circuit did not address any of the evidence discussed in the text above – even though all of it and more was presented at length (pages 37-46) in Hatfill's opening brief. Instead, the court cryptically alluded to some of the evidence and dismissed it in the two-sentence paragraph *after* its holding that a

defamation plaintiff must present evidence of a "*completely* fabricated story." Pet. App. 25a. Thus, even though, as discussed below, Hatfill's evidence is at least as compelling as the evidence of actual malice that this Court found sufficient in *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657 (1989) and *Masson*, the court of appeals found it irrelevant because it concluded that *other* evidence giving Kristof a basis for believing that Hatfill was the anthrax murderer rendered Hatfill's evidence of malice irrelevant.

The court presented in one paragraph the evidence purportedly showing that "the record contains substantial evidence to support The New York Times' contention that Kristof *actually believed* that Dr. Hatfill was the prime suspect." Pet. App. 24a. In fact, however, Kristof himself has *never* claimed that he "believed" Hatfill was the anthrax murderer, but instead he "remained 'agnostic'" on that issue. Times' Brief at 52 (quoting *Howard v. Antilla*, 294 F.3d 244, 254 (1st Cir. 2002)). Kristof's position was consistent with The Times' argument, rejected by the Fourth Circuit in 2005, *Hatfill*, 416 F.3d at 332-33, that the articles did not accuse Hatfill of being the anthrax murderer. Usually, the reporter in a defamation case testifies that he believed the allegedly defamatory accusation – although this Court has held that a defendant cannot "insure a favorable verdict by testifying that he published with a belief that the statements were true." *St. Amant*, 390 U.S. at 732. When, as here, a reporter remains "agnostic" concerning the truth of his allegations, it almost necessarily follows that

there is a jury question as to whether the reporter knew that his allegations were false or he advanced them recklessly.

Moreover, the evidence the court cited to show that Kristof "actually believed" that Hatfill was the murderer boils down to the contention that Hatfill was a scientist who worked at Fort Detrick, where anthrax was stored, and (like many scientists there) had some knowledge of anthrax, and therefore (like the other scientists at Fort Detrick) the FBI had investigated him. Such minimal evidence, however, does not support the court's conclusion that *no* "reasonable jury could find that Kristof had a 'high degree of awareness' that Dr. Hatfill was *not* the anthrax mailer," Pet. App. 25a, where Kristof fabricated additional "evidence" and otherwise embellished the facts. If Kristof had genuinely believed that the existing evidence pointed to Hatfill, there would have been no need to manufacture more.

Lest the Court think that the Fourth Circuit could not really have meant that only a "*completely* fabricated" allegation shows malice, it is clear that the Fourth Circuit so held. First, whether a "complete" fabrication is required was debated in the briefs. The Times argued in its brief (at 58) that the Fourth Circuit's decision in *Ryan v. Brooks* required a "'*completely* fabricated story,'" emphasizing "completely." In our reply brief (at 29), we explained: "There is no basis in law or logic for the theory that a publisher may fabricate extremely damaging accusations by including some innocuous material that happens to be true." The Fourth Circuit then

adopted The Times' contention by quoting *Ryan v. Brooks* and emphasizing "completely," just as The Times had. Pet. App. 25a. Second, as discussed above, the court simply ignored Hatfill's evidence that Kristof fabricated some allegations and distorted other facts immediately after saying that Kristof had not "*completely* fabricated" his accusation.

B. The Fourth Circuit's Decision Is Inconsistent With Decisions Of This Court.

The Fourth Circuit's "*completely* fabricated" rule is inconsistent with this Court's decision in *Harte-Hanks*. There, a woman named Alice Thompson claimed that "'Dan Connaughton, candidate for Hamilton Municipal Judge,'" offered her and her sister jobs in exchange for helping to show corruption by an employee of the incumbent judge. 491 U.S. at 680. Connaughton sued the newspaper publishing Thompson's allegations for defamation. This Court noted that "[e]ach of Thompson's allegations was accurately reported." *Id.* Moreover, the newspaper had interviewed Connaughton, who "acknowledge[d]" that he had suggested that the sisters might be able to work for his wife if she opened an ice cream shop. *Id.* at 677-678.

Notwithstanding that the newspaper had followed up to ensure that there was some truth to the allegations, this Court faulted the paper for failing to interview Thompson's sister to see if she would corroborate the accusation and for failing to listen to recordings that could have confirmed

whether Thompson's story was accurate. *Id.* at 682-683. The Court reasoned that the jury could reasonably have concluded that the paper did not interview the sister or listen to the tapes because it wanted to run the story without learning anything that undermined Thompson's story. *Id.* Plainly, however, under the Fourth Circuit's *complete* fabrication rule, *Harte-Hanks* would never have gone to the jury because Connaughton admitted making a statement that Thompson could have interpreted as a job offer. The article, in short, was not a *complete* fabrication.

Moreover, the Court explicitly rejected the argument that the newspaper could "claim immunity from suit because portions of Thompson's account of the relevant events were confirmed by Connaughton." *Id.* at 692, n.37. It added: "'[T]he defamer may be [all] the more successful when he baits the hook with truth.'" *Id.* at 692 n.37 (quoting, *Afro-American Publishing Co. v. Jaffe*, 366 F.2d 649, 655 (D.C. Cir. 1966)). There is no room under this Court's reasoning for the Fourth Circuit's "*complete* fabrication" rule, under which baiting the hook with truth immunizes any defamatory statements that follow.

Moreover, Kristof was guilty of the same error the Court identified in *Harte-Hanks*. He failed to contact George Borsari, the owner of the alleged "safe house" where Hatfill gave Cipro to visitors, even though Borsari described himself as "the easiest person in the world to track down." JA1925. A jury could

reasonably conclude that Kristof did not want to learn anything that undermined his "guesswork."

The Fourth Circuit's approach is also inconsistent with this Court's decision in *Masson*. The defendant there was an author who wrote a book about Masson using inaccurate quotations from him that "portray[ed] him in a most unflattering light." 501 U.S. at 501. The district court granted summary judgment because "the allegedly fabricated quotations were either substantially true, or were one of a number of possible rational interpretations of a conversation or event that bristled with ambiguities." *Id.* at 508-09 (internal quotation marks deleted). The Ninth Circuit affirmed "for the reasons stated by the District Court." *Id.* at 509. Essentially, both courts held that while the quotations were fabricated, they were not "*completely* fabricated." This Court reversed.

C. The Fourth Circuit's Decision Is Inconsistent With Decisions Of Other Circuits.

No other court of appeals has adopted a "*completely* fabricated" rule. Many have reversed grants of summary judgment that would be affirmed under the Fourth Circuit's standard.

For example, *Rebozo v. Washington Post Co.*, 637 F.2d 375, 377 (5th Cir. 1981), involved an article alleging: "Rebozo, President Nixon's close friend, cashed $91,500 in stolen stocks in 1968 after he was told by an insurance investigator it was stolen, the investigator's sworn statement and other records in a Miami court file indicate." But there was some

ambiguity as to what the "sworn statement" of the insurance investigator actually "indicated." The investigator had told Rebozo that he "was investigating the theft of nine 100-share certificates" that matched the numbers of certificates in the possession of Rebozo's bank. *Id.* at 376. He had also told Rebozo "at that time that the stock had been stolen or was missing from E.F. Hutton & Co." *Id.* Reversing a grant of summary judgment in favor of the newspaper, however, the Fifth Circuit faulted the paper for resolving "the obvious ambiguity whether . . . [the investigator] told Rebozo the stock was (a) missing, (b) stolen, or (c) missing or stolen, in favor of the most potentially damaging alternative," concluding that it "creates a jury question on whether the publication was indeed made without serious doubt as to its truthfulness." *Id.* at 382.

A court applying the "*completely* fabricated" rule would have affirmed the grant of summary judgment. Indeed, while there was some ambiguity to the insurance investigator's testimony, the article provided the most plausible reading. Consistent with *Rebozo*, the Fifth Circuit would have reversed the grant of summary judgment in this case because Kristof did far more than interpret one ambiguous piece of evidence against Hatfill – he fabricated evidence and repeatedly stretched the truth to point to Hatfill.

Similarly, the Ninth Circuit's decision in *Crane v. The Arizona Republic*, 972 F.2d 1511 (9th Cir. 1992), contrasts with the "*completely* fabricated" approach and shows that the Ninth Circuit would have

resolved this case differently. In that case, Jerry Vann, a felon who testified for the government in organized crime prosecutions, alleged corruption on the part of the former head of the organized crime strike force in the U.S. Attorney's Office in Los Angeles, Richard Crane. Vann maintained that Crane, who had moved to private practice, had influenced the head of his old office, James Henderson, to dismiss strong cases against his organized crime clients. The allegations prompted a congressional investigation resulting in a letter to the Attorney General that "'strongly urged'" him "'to undertake a vigorous investigation.'" *Id.* at 1515.

After a reporter interviewed Vann, Crane, Henderson, and the Chief of Staff of the congressional committee, the newspaper published an article under the headline *U.S. Crime Strike Force in L.A. Accused of Corruption. Id.* at 1516. Crane and Henderson brought defamation actions and the district court dismissed Henderson's case on the ground that he could not show actual malice. The Ninth Circuit reversed because the article had "juxtaposed" the denials given by Crane and Henderson in a manner that suggested that one of them was lying. The article first recounted Crane's denial and said that Crane had talked to Henderson, who described Vann as a "kook." *Id.* at 1522, 1523. The next paragraph said that Henderson was not aware of the allegations and had not talked to Crane. *Id.* at 1522. The statements in both paragraphs were accurate – the apparent discrepancy resulted from the fact that the reporter had talked to Henderson *before* he talked to Crane, and the two had discussed

Vann's charges in the interim. *Id.* The Ninth Circuit held that "a reasonable jury could conclude that the juxtaposing of the denials was undertaken either knowingly or in reckless disregard of the false impression it would produce concerning Crane's and Henderson's own credibility." *Id.* at 1524.

The Fourth Circuit's approach forecloses that conclusion. The congressional committee that had investigated Vann's allegations had concluded that they were "credible and warranted a full investigation." *Id.* at 1515. In other words, the allegations in the article were anything but "*completely* fabricated." The evidence concerning the juxtaposition of the statements is a much weaker indication that the reporter had doubts about the truth of his assertion than exists here.

Finally, the Fourth Circuit's decision is inconsistent with the rule, adopted by many circuits, that "Plaintiffs are entitled to an aggregate consideration of all their evidence to determine if their burden has been met." *Tavoulareas v. The Washington Post Co.*, 817 F.2d 762, 794 n.43 (D.C. Cir. 1987) (en banc). The *complete* fabrication rule does not permit aggregate consideration of the evidence showing actual malice, but instead cuts off consideration if *some* evidence that was not fabricated supports the allegedly defamatory allegation. A treatise has recently described the "cumulative impact" question as "[o]ne of the most perplexing issues concerning proof of actual malice," concluded that "the case law is not completely free of ambiguity," and added that "this issue is frequently

crucial on appeal review." RODNEY A. SMOLLA, *LAW OF DEFAMATION* (2D ED., THOMSON/WEST 2008) (1986) §3:45 at 3-71, 3-72, and 3-72.1.

Review of the Fourth Circuit's decision in this case would permit the Court to decide whether Hatfill's evidence of actual malice should be considered individually or aggregated. More importantly, however, certiorari should be issued so that the Court may reject the *complete* fabrication rule and find that under a proper standard the evidence that the Fourth Circuit ignored should go to a jury to determine actual malice.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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